TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 132.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, APPELLANTS,

vs.

JOB SMITH, SAMUEL A. MERRITT, AND J. B. ROSBOROUGH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED AUGUST 8, 1876.

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1 Territory of Utah, supreme court, *ss*:

Be it remembered that at a term of the supreme court within and for the Territory of Utah, begun and held at the court-house in Salt Lake City, in the county of Salt Lake, and Territory of Utah, on the 7th day of June, A. D. 1875.

Present, the honorable James B. McKean, chief justice; Jacob L. Borman, associate justice; Philip H. Emerson, associate justice.

Among the records and proceedings of said court, are the following:

On the 15th day of May, A. D. 1875, came Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, by Snow and Hoge, their solicitors and counsel, and filed in the clerk's office of this court a transcript on appeal from the district court of the third judicial district, in a case wherein the said Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, were appellants, and Job Smith, Samuel A. Merritt, and J. B. Rosborough were appellees, and of
2 which the following is a full, true, and correct printed transcript of the original transcript now on file in office of clerk of the supreme court of Utah Territory.

3 Territory of Utah, supreme court, June term, 1875.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, wife of the said Joseph G. Hussey,
vs.
JOB SMITH, SAMUEL A. MERRITT, AND J. B. ROSBOROUGH.

Appeal from the third judicial district court to this court.

4 *Transcript on appeal.*

On the 29th day of November, 1873, the plaintiffs in this action, by their counsel and solicitors, Snow and Hoge, filed in the third judicial district court of this Territory, a bill in chancery, against the said defendants, which said bill is in the words and figures following, viz:

Territory of Utah, third judicial district court, sitting in chancery, Hon. Jas. B. McKean, judge.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, wife of the said Joseph G. Hussey,
vs.
JOB SMITH, J. B. ROSBOROUGH, AND SAMUEL A. Merritt.

I. Humbly complaining, your orator and oratrix, the above named Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph
5 G. Hussey, show unto the court aforesaid that the said Joseph G. Hussey and the said Mary G. Hussey are husband and wife, residing in the city of Cleveland, in the county of Cuyahoga, and State of Ohio. And that the said Job Smith, Samuel A. Merritt, and J. B. Rosborough are residents of the city and county of Salt Lake, and Territory of Utah.

II. They further show unto the court that, on the 12th day of May,

1870, the district court of the third judicial district of the Territory of Utah, in a certain action in said court then pending, wherein the United States of America, on the relation of Joseph M. Orr, then marshal of the United States for the district of Utah Territory, by Charles H. Hempstead, district attorney of the United States, were plaintiffs, and John D. T. McAllister, Territorial marshal for Utah Territory, was defendant, rendered a judgment ousting the said John D. T. McAllister from serving the process of the district and supreme court of the Territory in any case, and holding that the United States marshal for the district of Utah was the only officer authorized by law to serve the process of either of said courts, from which an appeal was taken in due form of law to the supreme court of the Territory.

And afterwards, at the October term of the supreme court of the Territory, held in the same year, the said case was brought to a hearing in said court, at which the said judgment was affirmed, so that from the said 12th day of May, 1870, till the 30th day of April, 1872, the United States marshal was the acting ministerial officer of said court, and served all its process, mesne and final.

III. And the said complainants farther show unto the the court
6 that the said Job Smith, one of the respondents herein, on the 13th day of September, 1868, was, and for more than ten years prior thereto he had been, in the quiet, peaceable and lawful possession of, and the lawful owner of the improvements on, and of the real estate hereinafter described, situate in the city and county of Salt Lake, and Territory of Utah, viz: "A part of lot one, block fifty-eight, plot A," of Salt Lake City survey, commencing for the same at a point on the east line of said lot, one hundred and seventy-nine and a half (179½) feet from the southeast corner thereof, thence north eighteen and a half feet, thence west ten rods, thence south thirty-three feet, thence east five rods, thence north fourteen and a half feet, thence east five rods to the place of beginning, containing fifteen square rods and one hundred and sixty-five square feet. And that from the 13th day of Sep., 1868, till the present time, he has been in the actual possession and receipt of the rents, issues, and profits thereof, which rents, issues and profits have been worth per annum, since March 4, 1871, the sum of six hundred dollars.

IV. They further inform the court that on the 18th day June, 1873, the said Job Smith sold, and conveyed to Samuel A. Merritt and J. B. Rosborough, one equal, undivided half of said real estate, the deed of which is recorded in said Salt Lake County record book, page 510–511; that at the time of this conveyance they, the said Samuel A. Merritt and J. B. Rosborough well knew that the said Mary G. Hussey claimed to have, and did actually have, the right and title to the same as hereinafter set forth.

V. That the said Job Smith, on the 13th day of September, 1868, executed and delivered his prommissory note to John M. Bernhisel,
7 of said city of Salt Lake, and thereby promised to pay said Bernhisel the sum of thirteen hundred and fifty dollars on or before November 30, 1869, with interest from date till paid at the rate of two per cent. per month, value received; and at the same time gave him a mortgage on said real estate, conditioned to be void on the payment of the money in said note specified.

And afterward, on the 16th day of Sep., 1869, the said Job Smith, for value received, gave his promissory note to James Linforth, of the State of California, for the sum of $1,058.43, payable on or before the 16th day of September, 1870, with interest at the rate of 18 per cent. per annum,

from date till paid, and a mortgage on said real estate, conditioned to be void on the payment of the money in said note mentioned. Both of said mortgages were recorded in due time in the county records of said Salt Lake County. The mortgage to said John M. Bernhisel is recorded on book B., p. 632, and the mortgage to said James Linforth is recorded in book B., p. 664–5.

VI. They further show unto the court that on the 3rd day of December, 1870, both of said mortgages and notes were in full force, and the money therein mentioned unpaid; and that the said John M. Bernhisel, on the said 3rd day of December, 1870, filed a bill in the third judicial district court of said Territory, against the said Job Smith and the said James Linforth, containing suitable and apt words, setting forth his own note and mortgage, and praying for an order to sell said property unless said money should be paid. Afterwards, process was issued and, by M. T. Patrick, U. S. marshal, served pursuant to the practice of the court. Afterward, on the 31st day of January, 1871, the said
8 district court entered a decree in said case, finding that the process had been duly served, and that the said Job Smith had made default; also finding due said Bernhisel, on said note and mortgage to him, the sum of one thousand nine hundred and seventy-one dollars, and ordered that unless the said Job Smith pay said money within five days thereafter, said real estate be sold by the said M. T. Patrick, U. S. marshal, to make said money and costs in that behalf.

VII. Afterward, on the 6th day of February, 1871, the money in said decree mentioned not being paid, an order in due form and with apt words was issued by said court, directed to said M. T. Patrick, as such United States marshal, directing him to sell such real estate; and that afterward, on the 4th day of March, 1871, the said M. T. Patrick, as such marshal, in obedience to the commands of said order, sold said real estate to one William Jennings, of said Salt Lake City, for the sum of three thousand dollars, which money was soon thereafter paid by the said William Jennings, and the said marshal reported said sale to said court, which, on examination, was confirmed by the court, and the money arising therefrom was applied in payment of the costs of suit and sale, and in payment of the mortgage money to said Bernhisel, paying it in full, and the balance, being the sum of about eight hundred dollars, was applied in part payment of the money due on the note and mortgage to said James Linforth.

VIII. Afterward, on the 8th day of March, 1872, the time allowed by law for the redemption of said real estate having elapsed, and the land not being redeemed, the said M. T. Patrick, as such marshal, executed and delivered to said William Jennings, a deed of said land, in due form, and on the 9th day of March, 1872, the said William Jennings
9 executed and delivered a deed of said land to the said Mary G. Hussey.

IX. They further show unto the court that after the purchase of the said real estate by the said William Jennings, as aforesaid, and before the execution of the deeds of conveyance aforementioned, the said marshal, under a mistake of law, to wit, on the 4th day of March, 1871, executed a deed of conveyance thereof to said William Jennings, which was defective, in that it was made before the time allowed by law for its redemption, and it had only one witness, which deed is recorded in Salt Lake County records, book B, p. 833–4.

X. Afterward, on the 2nd day of December, 1871, the said William Jennings sold and conveyed said real estate to one James M. Smith, which deed is recorded in said record book E, p. 491, and the said James

M. Smith, on the 4th day of December, 1871, sold and conveyed said real estate to the said Mary G. Hussey, for the sum of three thousand five hundred dollars, which sum she actually paid for the same, the deed for which is recorded in book E, p. 493, of said Salt Lake County records.

XI. They further show unto the court that the two deeds of conveyance herein first referred to and set forth were made and delivered to perfect the title under the laws of Utah Territory, so far as said laws could effect the same to the land; the other three deeds herein referred to being defective in form, and for the want of power in the marshal to make the same.

XII. They further show unto the court that said real estate is within the coporate limits of Salt Lake City, and a part of the land subject to the law of Congress, entitled "An act for the relief of the
10 inhabitants of cities and towns upon the public lands," approved Mar. 2, 1867; and that on the 4th day of November, 1871, Daniel H. Wells, mayor of Salt Lake City, pursuant to the act of the governor and legislative assembly of the Territory of Utah, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress, entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,'" approved March 2nd, 1867, approved Feb. 17, 1869, declared upon the lands so occupied, of which, as before said, this land is a part. And that afterward, on the 1st day of June, 1872, the United States of America issued a patent for said land to the said Daniel H. Wells, mayor, as aforesaid.

XIII. And they further show unto the court that on the 11th day of December, 1871, the said Job Smith filed a claim for so much of said city lot as is hereinbefore described with the probate court of said county of Salt Lake, as provided by said act of the governor and legislative assembly of Utah Territory, and therein prayed to be adjudged the owner in fee of the same; and that on the said 11th day of December, 1871, the said Mary G. Hussey, by her agent, H. Potter, also filed a claim with said court, pursuant to said last-mentioned act, praying to be adjudged the owner in fee of the same land. Afterward, on the 24th day of May, 1872, the said Mary G. Hussey, by leave of the said probate court, filed another claim to said land, for the reason that at the time of filing her first claim the title in herself had not been perfected, as she was advised by her counsel.

XIV. Afterward, on the 10th day of July, 1872, the applica-
11 tions aforesaid came on to be heard in said probate court, before the Hon. Elias Smith, judge of said court, when, upon consideration, the court was of the opinion that the sale of said real estate did not transfer the title to the said Mary G. Hussey, and therefore the court ordered and adjudged that a deed be given to the said Job Smith, holding that the lien on the same by reason of the mortgages aforesaid was a subsisting lien. From this decision an appeal was taken to the district court of the third judicial district of the Territory, which appeal was heard at a day in the March term of said court, 1873, and the judgment of the probate court aforesaid was affirmed. And from this judgment there was an appeal taken to the supreme court of the Territory, which appeal was brought on to be heard at the October term thereof of the same year. Upon consideration, the supreme court was of the opinion that, as the said Job Smith was in the actual possession thereof at the time the declaratory statement was filed by the said Daniel H. Wells, mayor, as aforesaid, and the said Mary G. Hussey had not the possession, but was a resident of Ohio, that the said Job Smith was entitled to a deed, and therefore affirmed the judgment of the dis-

trict court, and ordered Daniel H. Wells, as such mayor, to give a deed thereof to him, which was given, pursuant to said order, on the 19th day of November, 1873, so that they, the said Job Smith, and the said Samuel A. Merritt, and the said J. B. Rosborough, now have the legal title to said land; and if the proceedings hereinbefore set forth to foreclose said mortgages are valid, the said Job Smith has, by means thereof, discharged his debts with the money of the said Mary G. Hussey.

12 XV. They further show unto the court that the said John M. Bernhisel and the said James Linforth, being willing to aid your oratrix to obtain the land or recover back her money, have assigned to her, the said Mary G. Hussey, their respective rights to said land and the money mentioned in their respective promissory notes, given by the said Job Smith to them respectively.

XVI. In consideration thereof, and inasmuch as there is not a plain, nor a speedy, nor an adequate remedy at law, your orator and oratrix humbly pray the court to take into consideration their case, and order that the said Job Smith, the said Samuel A. Merritt, and J. B. Rosborough be made parties respondent to this bill; and that the process of this court may be issued in due form, with apt words, and be served on them, and on each of them, commanding them to appear at the time prescribed by law and the rules of court, and severally answer upon oath, according to their knowledge, information, and belief, the several allegations herein, and each of them, and each and every part thereof. And that the court will order, adjudge, and decree that they, the said Job Smith, Samuel A. Merritt, and J. B. Rosborough, have the legal title in trust for the said Mary G. Hussey, and be ordered to convey the same to her; and that an account may be taken of the value of the rents, issues, and profits of said real estate, from the 4th day of March, 1871, to the finding of amount; and the said Job Smith be ordered to pay so much thereof as he has received, or had the benefit of, and the said Samuel A. Merritt and J. B. Rosborough be ordered to pay so much thereof as they have received, or had the benefit of, in each case, to the said Mary G. Hussey.

13 Or if this honorable court shall be of the opinion that the decree and sale of the real estate aforesaid, by order of said district court, did not pass the right to the same to the purchaser, then that the said Mary G. Hussey may be subrogated to the rights of the said John M. Bernhisel and the said James Linforth; that said decree and order of sale be set aside; that an account be taken of the amount due at the time of taking the account on said notes; that the same may be declared a lien on said land; and that unless the said Job Smith, and the said Samuel A. Merritt, and J. B. Rosborough, or one of them, shall pay said amount within some reasonable time to be named by the court, then that said real estate be sold to make said money and the costs in this behalf expended.

And that they may have such other and further relief as equity may require.

SNOW & HOGE,
Counsellors and Solicitors for the Complainants.

XVII. Which complaint was duly verified by Z. Snow, one of the counsel of plaintiffs.

XVIII. Afterward, on the 2d day of Feb'y, 1874, the process having been duly issued and served, came the said defendants by their counsel and solicitors, Rosborough and Merritt, and filed in this court a demurrer to said bill, which is in the words and figures following, viz:

14 *Demurrer.*

TERRITORY OF UTAH,
County of Salt Lake:

In the district court, third judicial district. In chancery.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, plaintiffs,
vs.
JOB SMITH, SAMUEL A. MERRITT, AND J. B. Rosborough, defendants.

The demurrer of Job Smith, Samuel A. Merritt, and Joseph B. Rosborough, defendants, to the bill of Joseph G. Hussey and Mary G. Hussey, the above-named plaintiffs.

15 These defendants, by protestation, not confessing all or any of the matters in said plaintiffs' bill contained to be true, as the same are therein set forth or otherwise, do demur to said bill, and for cause of demurrer show:

I. That the plaintiffs have not, in and by their said bill, made or stated such a case as entitled them in a court of equity to any relief against them, as to the matters contained in the said bill, or any of such matters.

II. That it appears by said bill that the same is exhibited against these defendants for distinct matters and causes, in which these defendants are not in any manner interested or concerned, and that the said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer, appearing in said bill, these defendants do demur thereto, and demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed with their costs in this behalf.

ROSBOROUGH & MERRITT,
Counsel and Solicitors for the Defendants.

We certify that, in our opinion, the foregoing demurrer is well taken in point of law.

ROSBOROUGH & MERRITT,
Counsel for Defendants.

TERRITORY OF UTAH,
Salt Lake County:

16 Job Smith, being duly sworn, declares that he is one of the defendants in the above entitled suit, and that the demurrer therein foregoing is not interposed for delay.

JOB SMITH.

Subscribed and sworn to before me, this second day of February, 1875.
JOSEPH NOUNNAN, *Clerk*,
By EWD. D. McKEAN, *Deputy*.

XIX. Afterward the case came to be heard in due course; was argued by the counsel of the respective parties, and by the court held under advisement until April 22d, 1875, when it was decided as follows:

This cause having heretofore been argued by counsel, and taken under advisement by the court, now on this day the demurrer is sustained, and

the bill dismissed without prejudice. To which ruling of the court the plaintiff duly excepted.

Afterward, on the 28th day of April, 1875, notice of appeal was filed and given, and on the 30th day of April, in the same year, an undertaking on the appeal was filed, which notice and undertaking were both sufficient and in due form.

XX. We, the undersigned, counsel of the respective parties, certify that the foregoing statement of this case has been agreed upon by us, and is true and correct.

SNOW & HOGE,
Counsel and Solicitors for Complainant.
ROSBOROUGH & MERRITT,
Counsel and Solicitors for Respondents.

MAY 5TH, 1875.

17 Afterwards, to wit, on the 14th day of June, A. D. 1875, said case came on to be heard in said supreme court of the Territory of Utah, and was argued by counsel of the respective parties, and by the court held under advisement until June 26th, 1875, and upon consideration the court entered the following decree:

Ordered and adjudged that the judgment of the court below be, and the same is hereby, in all respects, affirmed with costs.

Opinion.

Territory of Utah, supreme court, June term, 1875.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, appellants,
vs.
JOB SMITH, SAMUEL A. MERRITT, AND J. B. Rosborough, respondents.

Appeal from 3rd district court.

18 BOREMAN, justice:

This suit is brought to enforce alleged equitable rights under a decree and sale of mortgaged property. The appellants ask that respondents be adjudged to hold the property in trust for said Mary G. Hussey, or if the court do not so adjudge, that then the former decree be set aside; that said Mary G. Hussey be subrogated to the rights of Bernhisel and Linforth, and that the mortgage debt be declared a lien on the property, and the property sold again to pay mortgage debt.

A demurrer was entered against the bill, and based partly upon the ground that the bill (it is a chancery proceeding) did not state such a case as entitled the plaintiffs (appellants) relief sought.

It appears upon the face of the bill that the decree upon which this action is founded was rendered in a suit where the appellant, Job Smith, was sought to be brought in by process served by the United States marshal, but in which suit said Job Smith never appeared. The United States marshal did not have authority at that time to make the
19 service, and the court did not therefore have jurisdiction of the parties so as to render a decree binding upon the respondents, it was as to them void. There are not, therefore, sufficient facts stated in the bill to warrant the court in saying that the respondents should hold the legal title in trust for appellant, Mary G. Hussey.

The other branch of the case has reference to a new foreclosure of the mortgage, and the appellants ask that said Mary G. Hussey be subrogated to the rights of Bernhisel and Linforth in the matter.

The bill says that Job Smith gave a mortgage on the property, to be void on payment of the note specified. Such an allegation is not sufficient, in case of default of defendants, to authorize a decree for the sale of the property.

The bill stating that Job Smith gave a mortgage is simply a conclusion of law. It does not leave the question open to the court to decide whether the supposed mortgage be in fact a mortgage or not. Neither the mortgage nor its terms or conditions are set out. Upon a default, the court could not render a decree according to terms or conditions not known to the court.

There do not, therefore, appear sufficient facts in the bill to authorize a decree of foreclosure.

The judgment of the court below dismissing the bill was correct and it is affirmed.

LOWE, C. J. and EMERSON, J., concur.

TERRITORY OF UTAH,
County of Salt Lake, ss.

I hereby certify that the foregoing writing is a full, true, and complete copy of the original opinion of the supreme court of Utah, in said cause, delivered by Boreman, justice, on the 26th day of June, A. D. 1875, in open court, during *of* regular sitting of said court of the June term of 1875, and now on file in my office, having carefully compared the same.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court, this 28th day of June, A. D. 1875.

[L. S.] JOHN H. BEADLE, *Clerk*,
By CHA'S A. GOULD, *Deputy Clerk.*

(Endorsed:) Supreme court. Hussey et al. vs. Smith et al. Opinion of court. By Boreman, justice.

Petition for a rehearing.

Territory of Utah, supreme court, June term, 1875. In equity.

JOSEPH G. HUSSEY AND MARY G. HUSSEY
vs.
JOB SMITH, SAMUEL A. MERRITT, AND J. B. Rosborough.

Now comes Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, the complainants in the above-entitled action, and petition the court for a rehearing in this case and assign the following reasons:

1st. The court erred in holding that the bill did not state facts sufficient to entitle the plaintiffs to any equitable relief.

2nd. If the bill failed to sufficiently recite the terms of the mortgages referred to in the bill, the order ought, in equity, to have sustained the demurrer, with leave to amend the bill within some reasonable time to be named by the court; in default of such amendment, the bill to be dismissed.

3rd. The dismissing of the bill without prejudice is equal to dismiss-

ing the bill with prejudice, as, in law, a new action will be barred by the statute of limitations.

4th. The point, that the bill did not sufficiently recite the terms of the mortgages referred to in the complaint, was not made, nor attention called to it, in the court below, nor in the arguement of the counsel in this court. It is, for that reason, too late to raise it here without giving the complainants an opportunity to amend the bill.

SNOW AND HOGE,
Counsellors & Solicitors for the Complainants.

23 (Endorsed:) Supreme court. Jos. G. Hussey et al. vs. Job Smith et al. Petition for a rehearing. Filed in the office of the clerk of the supreme court of Utah Ter., June 30th, A. D. 1875. J. H. Beadle, clerk.

Territory of Utah, supreme court.

Afterwards, to wit, on the 11th day of January, A. D. 1876, said petition for rehearing came on to be heard in said supreme court of the Territory of Utah, and was, by consent of the respective counsel for the respondents and appellants, submitted to the court on petition and papers on file, and by the court held under advisement until January 25th, A. D. 1876, and, upon consideration, the court entered the following decree:

Ordered and adjudged, that the prayer of the petition for a re-
24 hearing be overruled, and that the former judgment of this court stands affirmed.

Supreme court.

TERRITORY OF UTAH,
County of Salt Lake:

Afterwards, to wit, on the 25th day of April, A. D. 1876, came the said Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, by Snow and Hoge, their solicitors and counsel, and filed in the clerk's office of this court an affidavit, an assignment of errors, and an allowance of appeal in said case, which are in the words and figures as follows, viz:

25 Territory of Utah, supreme court, sitting in chancery.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, wife of Joseph G. Hussey,
vs.
JOB SMITH, J. B. ROSBOROUGH, AND SAMUEL A. Merritt.

Now comes Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, by Snow and Hoge, their solicitors and counsel, and pray an appeal to the Supreme Court of the United States from the decisions of the supreme court of the Territory of Utah, rendered in the above-entitled action on the 26th day of June, 1875, and from the decree of said court overruling their petition for a rehearing in said case.

SNOW AND HOGE,
Counsel and Solicitors for the Petitioners.

Allowance of appeal.

26 The foregoing appeal is allowed as prayed for.
April 25th, 1876.

PHILIP H. EMERSON,
Justice of the Supreme Court of the Territory of Utah.

27 *Assignment of errors.*

The United States of America. Supreme Court. In chancery.

BETWEEN JOSEPH G. HUSSEY AND MARY G. Hussey, wife of the said Jos. G. Hussey, appellants,
and
JOB SMITH, J. B. ROSBOROUGH, AND SAMUEL A. Merritt, appellees.

Now comes Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, the appellants above named, by Snow and Hoge, their solicitors and counsellors, and say there are errors in the records and proceedings in this case, in this, viz:

1st. That it appears from the record and proceedings set forth, that the United States marshal who served the process in the case of Bernhisel against Job Smith and James Lynforth, was inducted into the
28 office by judicial authority, and being so in office he was by general reputation recognized as rightfully therein. He was therefore an officer de facto, and as such his service of the processes were legal, so far as necessary to protect the rights of third parties who submitted to or invoked his services. The supreme court of the Territory therefore erred in deciding that the United States marshal did not have authority at the time of the service of the process in the case of Bernhisel against Job Smith and James Linforth to make said service, and for that reason the court did not have jurisdiction in that case. That its action therein was void.

2nd. The bill describes the land sought to be sold, and its says "that Job Smith, on the 13th day of September, 1868, executed and delivered his promissory note to John M. Bernhisel, of said city of Salt Lake, and thereby promised to pay said Bernhisel the sum of thirteen hun-
29 dred and fifty dollars on or before November 30th, 1869, with interest from date till paid at the rate of two per cent. per month, value received; and at the same time gave him a mortgage on said real estate, conditioned to be void on the payment of the money in said note specified.

And afterward, on the 16th day of September, 1869, the said Job Smith, for value received, gave his promissory note to James Linforth, of the State of California, for the sum of $1,058.43 payable on or before the 16th day of September, 1870, with interest at the rate of eighteen per cent. per annum from date till paid, and a mortgage on said real estate, conditioned to be void on the payment of the money in said note mentioned. The supreme court of the Territory therefore erred in deciding that the bill did not sufficiently describe the mortgage to entitle the plaintiffs to a foreclosure.

3rd. The bill shows "that the said Mary G. Hussey purchased the property from William Jennings, the purchaser at the judicial sale, and that Bernhisel and Linforth have duly assigned all their right,

30 title, and interest in and to said premises, and said indebtedness to the said Mary G. Hussey. Therefore the supreme court of the Territory erred in deciding that the plaintiffs in this case were not entitled to be subrogated to the rights of the original mortgagees, Bernhisel and Linforth.

4th. The court erred in holding that the right of subrogation did not exist in this case.

5th. The court erred in dismissing the bill. If, as the court held, the mortgages were not sufficiently described, the demurrer ought to have been sustained, with leave to the plaintiffs to amend the bill within some reasonable time to be named, in default of amendment that the bill be dismissed.

For these and other errors appearing in the record, the said appellants pray that said judgment may be reversed.

SNOW AND HOGE,
Solicitors and Counsel for Appellants.

(Endorsed:) Supreme Court of the United States. Jos. G.
31 Hussey et al. vs. Job Smith et al. Assignment of errors. Filed April 25th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, dep'ty clerk.

Affidavit on appeal.

TERRITORY OF UTAH,
Salt Lake County, ss:

In the supreme court. In equity.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, wife of the said Jos. G. Hussey,
vs.
JOB SMITH, J. B. ROSBOROUGH, AND SAMUEL A. Merritt.

On this 22nd day of April, 1876, before me, C. G. Snow, notary public within and for Salt Lake County, in the Territory of Utah, per-
32 sonally appeared Z. Snow, at said county, who was by me sworn in due form of law, and who on his oath deposes and says, he is well acquainted with the real estate described in the bill in the above entitled action, and that it is of the value of more than five thousand dollars, as he firmly believes.

Z. SNOW.

Subscribed and sworn to before me the day and year first above written.

Witness my signature and seal.

[SEAL.] CORA G. SNOW,
Notary Public.

(Endorsed:) Territory of Utah, sup. court. Joseph G. Hussey et al. vs. Job Smith et al. Affidavit on appeal. Filed April 25th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, deputy cl'k.

33 The United States of America to Job Smith, J. B. Roseborough and Samuel A. Merritt, greeting:

You and each of you are hereby cited and admonished to be and appear before and at a term of the Supreme Court of the United States,

to be held in the city of Washington, in the District of Columbia, on the 9th day of October, 1876, pursuant to an appeal which has been allowed and taken to the said Supreme Court of the United States from a judgment of the supreme court of the Territory of Utah rendered on 26th day of June, 1875, in a case then pending and determined in said court wherein Joseph G. Hussay and Mary G. Hussay, wife of the said Joseph G. Hussay, were plaintiffs, and you, the said Job Smith, J. B. Roseborough and Samuel A. Merritt, were defendants, to show cause, if any there be, why the judgment in said appeal mentioned should not be reversed and corrected a' speedy justice should not be done
34 in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of our said Supreme Court of the United States, this 22d day of April, 1876.

PHILIP H. EMERSON,
One of the Justices of the Supreme Court of the Territory of Utah.

(Indorsed:) Supreme Court of the United States. Joseph G. Hussay et ux. vs. Job Smith et al. Citation. Filed April 28th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould dep'ty clerk. Snow & Hoge, attorneys for appellant.

We hereby acknowledge service of a copy of this citation for ourselves and for Job Smith, the appellees.
April 28th, 1876.

ROSBOROUGH & MERRITT,
Att'ys for Job Smith and for Ourselves in Person.

35 *Bond on appeal.*

THE UNITED STATES OF AMERICA:

Supreme Court.

JOSEPH G. HUSSEY AND MARY G. HUSSEY, wife of the said Jos. G. Hussey,
vs.
JOB SMITH, J. B. ROSBOROUGH AND SAMUEL A. Merritt.

On appeal to the Supreme Court of the United States from the supreme court of the Territory of Utah.

Know all men by these presents that L. S. Hills and George Crismon are held and firmly bound unto Job Smith, J. B. Rosborough, and Samuel A. Merritt, and to each of them, in the sum of three hundred dollars, to be paid to the said Job Smith, J. B. Rosborough, and Samuel A. Merritt, and to their executors and administrators, and to each of them; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and
36 each of our heirs, executors, and administrators, firmly by these presents. Signed with our hands and sealed with our seals this 22nd day of April, A. D. 1876.

Whereas the above-named Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, has sued out and taken to the Supreme Court of the United States, to reverse and revise a judgment of the supreme court of the Territory of Utah, rendered in the above-entitled action, by the said supreme court of the Territory of Utah, on the 26th day of June, 1875:

Now, therefore, the condition of the foregoing obligation is such, that if the said Joseph G. Hussey and Mary G. Hussey, wife of the said Joseph G. Hussey, shall prosecute their said appeal with effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

L. S. HILLS, [L. S.]
GEORGE CRISMON. [L. S.]

Sealed and delivered in presence of—
Z. SNOW.

37 Approved by me.

PHILIP H. EMERSON,
Judge of the Supreme Court of the Territory of Utah.

(Endorsed:) Supreme Court of the United States. Jos. G. Hussey et al., appellants, vs. Job Smith et al., appellees. Bond on appeal. Filed April 25th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, deputy clerk.

38 TERRITORY OF UTAH,
Salt Lake County:

I, Cha's A. Gould, clerk of the supreme court in and for the Territory of Utah, hereby certify that the foregoing is the original citation issued in this case and filed in this office, and a true and correct copy of the bond and affidavit on appeal in this case on file in my office.

In witness whereof I have set my hand and affixed the seal of said court this 21st day of July, A. D. 1876.

[SEAL.] CHARLES A. GOULD,
Clerk,
By H. A. GOULD,
Dep'ty Clerk.

39 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Charles A. Gould, clerk of the supreme court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct transcript of the proceedings and records, now on file in my office, in the foregoing entitled action.

In witness whereof I have set my hand and affixed the seal of said court this 6th day of July, A. D. 1876, at the clerk's office in Salt Lake City.

[SEAL.] CHARLES A. GOULD,
Clerk,
By HARRY A. GOULD,
Dep'ty Clk.

Clerk's fees, fifteen dollars. Rec'd paym't of plaintiff per hands of Z. Snow, att'y.
July 22nd, 1876.

CHAS. A. GOULD,
Clerk,
By H. A. GOULD,
Dep'ty Clk.

(Indorsement on cover:) No. 132. Joseph G. Hussey & Mary G. Hussey, his wife, appellants, vs. Job Smith, Samuel A. Merritt, and J. B. Rosborough. Utah Terr'y sup. court. Filed 3rd August, 1876.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1878.

MARY G. HUSSEY,
Appellant,
vs. No. 131.
JOB SMITH,
Appellee.

APPELLANT'S BRIEF.

SNOW & HOGE,
Counsel and Solicitors for Appellant.

ROSBOROUGH & MERRITT,
Counsel for Appellee.

HERALD PRINT.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1878.

MARY G. HUSSEY,
Appellant,
vs. No. 131.
JOB SMITH,
Appellee.

APPELLANT'S BRIEF.

This case and the case of Joseph G. Hussey and Mary G. Hussey, *Appellants,*
vs.
Job Smith and Samuel A. Merritt and J. B. Rosborough, *Appellees,* now on this Court's Calendar, No. 132, ought, as we think, to be considered together by this Court, which see :

STATEMENT OF THE CASE.

This case arose under the Act of Congress of March 2, 1867, with us, familiarly called, Townsite Act, (14 Statutes at Large, 541,) which authorizes the corporate authorities of incorporated cities, in certain cases, to enter of the public lands "*the lands so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests.*" This act, as the Court will perceive, authorizes the local legislatures to prescribe rules, etc., for the disposal of the lots.

The act of Utah prescribing these rules, found in Compiled Laws. 379,—among other things, (1168), Sec. 3, requires that each and every person or association, or

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The act of Utah prescribing these rules, found in Compiled Laws. 379,—among other things, (1168), Sec. 3, requires that each and every person or association, or

company of persons, or corporation, claiming to be the rightful owner of possession, occupant or occupants, or *to be entitled to the occupancy or possession* of such lands, or to any, lot, block, share or parcel thereof, to within a defined time, sign *a written statement containing an accurate description* of the particular parcel, etc., in which he, she or they claim to have an interest, and the specific right or interest or estate therein, and file this statement with the clerk of the probate court, etc.

A hearing in the probate court is afterward to be had and that Court (C. L., 381, (1168). Sec. 4,) is required to cause full minutes of the *testimony* to be kept and preserved with the papers in the case, to be entered in its records, with the decision at length. An appeal from this decision is provided for. On the perfection of which the probate court is to cause the *testimony* and *written proofs* adduced, together with the *statements* of the parties and *judgment* of the Court, to be certified to the District Court, to be there tried anew *without pleadings*, except as above provided.

The mayor of Salt Lake City, as provided by law, entered the land in November, 1871, and the notice contemplated by Sec. 2 of the Utah law, (C. L., 380, (1167), Sec. 2), having been given the several claimants to the lot in controversy, made and filed their *written statements* with the Probate Court, as provided by law.

This leads us to state the facts, as appears from the record.

Statement of Facts:

On the 30th day of September, 1868, Job Smith, one of the appellees, was, and for many years prior thereto he had been, the owner and in possession of the land in contest, subject only to the paramount title of the United States On that day, September 30, 1868, being indebted to John M. Bernhisel in the sum of $1,350, Job Smith, to secure the payment of that indebtedness, gave to Bernhisel a mortgage thereon, the money to be paid in November, 1869. In September, 1869, Job Smith gave another mortgage on said property to James Linforth, of California, to secure the payment of the sum of $1,058.43, twelve months

from that date. On the 3d day of December, 1870, John M. Bernhisel filed a bill in the District Court of the Third Judicial District, this Territory, against Job Smith and James Linforth, to foreclose this mortgage; a summons was issued, which was served by M. T. Patrick, U. S. Marshal of this Territory. The parties failed to appear and on the 31st day of January, 1871, the Court rendered a decree in favor of Bernhisel, and ordered the U. S. Marshal to sell the property. In this decree the Court said that the said Job Smith and James Linforth, *having been duly served with process, came not but made default.*

An order of sale was issued to M. T. Patrick, the U. S. Marshal. A sale thereof was made by him on the 4th day of March of that year, which sale was reported to the Court, and on the 13th day of March, 1871, the Court approved the sale and ordered the distribution of the money. The property was sold to William Jennings for $3,000. March 8, 1872, the Marshal made a deed thereof to William Jennings. March 9th, 1872, William Jennings having before that date agreed to sell the property, made a deed thereof to Mary G. Hussey, the appellant, a resident of Ohio.

It is on this judicial proceeding that Mrs. Hussey rests her claim for a deed. This was in evidence before the Probate Court and before the District Court of this district. Out of this and other judicial proceedings in this Territory, some of which have been before this Court, this contest arose.

We now call the attention of the Court to the pages in the printed record where these facts are to be found. The contest first arose before the Probate Court. Pages 1, 2, 3 and 4 show the statements in writing of the parties before the Probate Court, with the dates of their filings, each claiming a deed in fee. Page 7 shows the date and decision of the Probate Court, the date being July 10, 1872. This decision gave a part to Mrs. Hussey and a part to Job Smith. Mrs. Hussey took the deed of the part adjudged to her, and for the balance appealed to the District Court. The appeal took up, through the means of a certiorari, a certified copy of the judgment roll in the Bernhisel and Smith and Linforth suit of foreclosure, except the summons, which was not among the files. The

Bill is on pages 11 and 12. The mortgage is on page 13. The decree of the Court is on page 14. The certified order of sale is on page 15. The sale and report of sale are on pages 16 and 17. The order approving the sale is on page 23. The deed from the Marshal to Jennings is on page 18. The deed from Jennings to Mrs. Hussey is on page 20. The receipts for the money arising from the sale are on pages 17 and 18. The decision in the District Court is on page 25, dated August 19, 1873.

As questions concerning these findings of fact and conclusions of law arose in the Supreme Court of the Territory, we call attention to only a few therein, as it appears to us that we have before stated the facts correctly, assuming these findings to be conclusive against us.

The Court said the action was tried by the Court sitting without a jury, *on the testimony before and sent up by the Probate Court on the appeal.*

(These findings of fact did not find the deed of the Marshal to Jennings, nor the approval of the Marshal's sale by the Court, nor did it notice the amended statement in writing made by Mrs. Hussey on the 24th day of May, 1872, nor did it notice the Linforth mortgage. All the other facts stated by us are in the findings of fact by the Court.) If these are material, then there is this defect of findings of fact. No exceptions to these findings of fact or conclusions of law were filed, nor was there any conclusions of law filed other than the general one of entering judgment. The Court rendered judgment for Smith. From this an appeal by Mrs. Hussey took the case to the Supreme Court of the Territory. The Supreme Court of the Territory affirmed the judgment of the District Court. The written opinion of this Court is on pages 28, 29 and 30.

An appeal brings the case to this Court. The errors assigned are:

First—It appears from the record and proceedings in this matter that on the 11th day of November, 1871, Daniel H. Wells, mayor of Salt Lake City, declared upon the land in contest, among other lands, pursuant to the Act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, on which said 11th day of Novem-

ber, 1871, William Jennings, was, by virtue of the judicial sale, entitled to the possession of said land as against Job Smith, and that he afterward sold his right to Mary G. Hussey. It is, therefore, error to direct the deed to be given to Job Smith. It ought to have been ordered to be given to Mary G. Hussey.

Second—The jurisdiction of a Court of Record is conclusively presumed, unless from the record it negatively appears. Therefore, the judgment of the District Court of the Third Judicial District of the Territory of Utah, rendered on the 31st day of January, 1871, in the case of John M. Bernhisel against Job Smith *et al.*, to foreclose the mortgage, ordering the sale, and confirmation of the sale, entered March 13th, 1871, were judicial action, and transferred the right of Job Smith to the land and the right of possession thereof to the purchaser, so that on the 11th day of November, 1871, the purchaser at such sale was in equity entitled to the possession of the land in contest. It is, therefore, error to direct the deed to be given to Smith.

Third—In a contest for a deed for land under the Act of Congress and under the Act of Utah, the person who has the right in equity to the land, as neither has the legal title, is to have the deed. In this case it is Mary G. Hussey, as she had succeeded to the right of the purchaser under the judicial sale.

Prayer for reversal, etc.

ARGUMENT:

We shall consider together the several errors assigned, but add that a single glance at the record tells us that there are only two points in the case. They are,

First—Was M. T. Patrick the U. S. Marshal at the time of serving the processes of the Court in the foreclosure suit a Territorial Marshal *de facto?* If so, his service was good and cannot be attacked collaterally; it gave the Court jurisdiction of the person of Smith.

Second—Does a purchaser of town property, under a judicial sale ordered against the rightful claimant, succeed to the rights of the person against whom the order is made, without actual possession, when the sale had been perfected before the mayor enters the land?

We maintain the affirmative on these points.

It seems proper in the outset to explain to the Court why the United States Marshal acted at that time as the Territorial Marshal and served the process of the Court in the foreclosure suit. We cannot do this better than we have done in an allegation in the suit of Joseph G. Hussey and wife against Job Smith *et al.*, No. 132, of the present calendar, Item II of that case, page 1. John D. T. McAllister on the 12th day of May was, and for several years prior thereto he had been Territorial Marshal

Our allegation then says: "They further show unto the Court that on the 12th day of May, 1870, the District Court of the Third Judicial District of the Territory of Utah, in a certain action in said Court then pending, wherein the United States of America, on the relation of Joseph M. Orr, then Marshal of the United States for the District of Utah, by Charles H. Hempstead, District Attorney of the United States, were plaintiffs, and John D. T. McAllister, Territorial Marshal for Utah Territory, was defendant, rendered a judgment ousting the said John D. T. McAllister from serving the process of the District and Supreme Court of the Territory in any case, and holding that the United States Marshal for the District of Utah was the only officer authorized by law to serve the process of either of said Courts." From which an appeal was taken, in due form of law, to the Supreme Court of the Territory.

Afterwards, at the October term of the Supreme Court of the Territory, held in the same year, the said case was brought to a hearing in said Court, at which the said judgment was affirmed, *so that from the said 12th day of May, 1870, till the 30th day of April, 1872, the United States Marshal was the acting ministerial officer of said Court, and served all its processes, mean and final.*

The judgment roll in this case is not on file in our Court records, having been, by accident or design, innocently or criminally, we know not which, taken therefrom, which explains to this Court why the U. S. Marshal served the process in the foreclosure suit, and why we do not send a certified copy of it to this Court for its inspection, to enable it to be officially informed of this proceeding.

But this Court has some official information on this subject, derived from the cases of Clinton *vs.* Engelbrecht, 13 Wall, 434, and Snow *vs.* The United States, 18 Wall, 317.

We specifically call the attention of the Court to the fact, that the entire proceedings in the Bernhisel and Smith and Linforth case, including the making of the Marshal's deed, took place between December 3, 1870, and March 9, 1872.

We shall not trouble this Court with a formal definition of *de facto* officer, but call attention to The State *vs.* Carrol, 38 Conn., 449; same case. 9 American R., 409; Fowler *vs.* Bebee, 9 Mass., 231; Commonwealth *vs.* Fowler, 10 Mass., 290; same case, 11 Mass., 338, and ask,

Can it be doubtful?

Bernhisel was, by judicial action, forced to submit to such a service. Jennings, relying upon it, purchased the lot and paid his money. Mrs. Hussey, by her agent Potter, relying on the Court's decision, bought of Jennings and paid her money. But as the decision of this Court in Clinton *vs.* Engelbrecht, *supre*, reached us before the case at bar was heard in the Probate Court, that Court, the District and Supreme Courts, fatal as their rulings were to Mrs. Hussey, treated the decision in the foreclosure [redacted] with silent contempt; but this silence speaks louder than words. All held the proceedings void, no doubt, though not one word was said by any of these Courts, on the subject of its being void. Printed Record, 7, 25, 28, 29 and 30

The mischief, whatever that was, wherever it originated, whoever was wrong, was at that time all done and could not be undone. The loss fell on Mrs. Hussey, the gain on Smith. Smith had paid his debt with Mrs. Hussey's money.

At an early period after our Code took effect, which was in August, 1870, our Courts, in considering the 9th Section of our Organic Law, and the decisions of this Court in Nounnan *vs.* Lee, 2 Black, 499, and Orchard *vs.* Hughs, 1 Wall, 73, and the rule of this Court made April 18, 1864, 1 Wall, arrived at the conclusion that the mode of procedure in chancery cases must be as prescribed by the rules of this Court, for the practice in the Circuit Courts sitting in chancery cases. This conclusion had not been reached

when the foreclosure suit was commenced, but had been before the case at bar was heard in the Supreme Court of the Territory, which explains why pains was taken to show that the first process was a summons and not a subpœna. Printed Record, page 29. But as the Act of Congress passed April 7, 1874, 18 Statutes, 17, was designed to remove these doubts and was enacted subsequent to the hearing of the case at bar in our Court, and as it *confirmed* the several Territorial Codes, *validated* and *confirmed* the proceedings before that date had under them, the case now falls back to the question, whether or not the U. S. Marshal was authorized to serve the process of the Court.

As to the second error assigned, we say, from the day of sale—March 4, 1871—Jennings, the purchaser, as against Smith, was, unless the property was redeemed, entitled to the possession thereof and to the rents, issues and profits. Compiled Laws, 470 (1491), Sec. 230, and Mrs. Hussey, by her purchase, succeeded to his rights.

She, though actually domiciled in Ohio with her husband, had full right, with his permission, to use, by her agent, her own funds in Salt Lake City in purchasing townsite property and might, without violating any law or public policy, by her agent, actually occupy said property and [redacted] the same time, be doing a banking business by her cashier, in her own banking house in San Francisco. The doctrine that, she, to use a phrase concerning cattle, must, nightly, be levant and couchant on the lot is inconsistent with personal liberty, inconsistent with personal rights, inconsistent with reason, inconsistent with the Townsite Act and inconsistent with the act of Utah. She was an occupant of the lot, within the meaning of that word as used in the Act of Congress, and as used in the Act of Utah, and within the very terms of the Utah law.

While it is true that no exceptions were taken to the rulings of the Court below, still we say none was needed, as this class of cases is governed in its procedure by special rules, which do not require exceptions; but if in this we are wrong, the findings of fact by the Court show that judgment ought to have been given for Mrs. Hussey.

SNOW & HOGE,
Counsel and Solicitors.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878.

JOSEPH G. HUSSEY and
MARY G. HUSSEY,
Appellants,

vs. No. 132.

JOB SMITH,
SAMUEL A. MERRITT and
JOSEPH B. ROSBOROUGH,
Appellees.

APPELLANTS' BRIEF.

APPEAL FROM THE SUPREME COURT, TERRITORY OF UTAH.

SNOW & HOGE,
Counsel and Solicitors for Appellants.

ROSBOROUGH & MERRITT,
Counsel for Appellees.

HERALD PRINT.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1878.

JOSEPH G. HUSSEY and
MARY G. HUSSEY,
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vs. No. 132.

JOB SMITH,
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JOSEPH B. ROSBOROUGH,
Appellees.

APPELLANT'S BRIEF.

APPEAL FROM THE SUPREME COURT, TERRITORY OF UTAH.

The following is substantially a correct history of this case, as appears from the printed record:

On the 12th day of May, 1870, and for several years prior thereto, John D. T. McAllister was the Territorial Marshal of this Territory, and as such discharged all the duties, as executive officer, of the several District Courts for said Territory. On the said 12th day of May, 1870, proceedings were commenced in the Third District Court of the Territory, in the nature of *quo warranto*, against said McAllister, and by the judgment of the Court McAllister was ousted from said office, and the U. S. Marshal was adjudged to be the proper officer to serve all process issued out of said District Court. This judgment was

affirmed by the Territorial Supreme Court at the October term, 1870. (Paragraph II of printed record.)

That Job Smith, one of the respondents herein, on the 13th day of September, 1868, and for ten years prior to said date, was in the possession, the owner of the right of possession, with the improvements thereon, of the property described in the complaint. (Paragraph III printed record.)

On the 18th day of June, 1873, the said Smith conveyed to Merritt and Rosborough an undivided one-half of said real estate, the latter, at the time of accepting said conveyance, knowing of the claim of Mary G. Hussey. (Paragraph IV. printed record.)

That said property is a part of a town lot situate in the city of Salt Lake, in this Territory.

That on the 13th of September, 1868, Job Smith gave to John M. Bernhisel a promissory note for $1,350, bearing interest at the rate of two per cent. per month from date until paid; and at the same time and place he executed and delivered to said Bernhisel a mortgage on the same property, to secure the payment of said sum of money and interest, and on the 16th day of September, 1869, said Smith, being indebted to one James Linforth, on promissory note, in the sum of $1,058.43, drawing interest at the rate of eighteen per cent. per annum from date till paid, on the same day executed and delivered to the said Linforth a mortgage on the same property, to secure the said principal sum, together with interest thereon. (Paragraph V, printed record.)

On the 3d day of December, 1870, the principal and interest of the notes not having been paid, and the said mortgages being in full force, John M. Bernhisel commenced proceedings to foreclose his mortgage, and made Job Smith and Linforth defendants to the action. This proceeding was commenced under the "Civil Procedure Act" of this Territory. That under said "Act" process was duly issued and served on the said Smith and Linforth by M. T. Patrick, the then U. S. Marshal, and there being no appearance, a default was entered and decree of foreclosure was entered in due form, the amount found due to Bernhisel then being $1,971. (Paragraph VI, printed record.)

On the 6th day of February, 1871, an order of sale was issued out of said Court, directing the sale by the said U. S. Marshal, M. T. Patrick, of the said property, and on the 4th day of March following sale was made by said Marshal, and the same was bid off by William Jennings for $3,000. The Marshal reported the sale to the Court, which was by the Court confirmed, and after paying the amount due Bernhisel, and costs, etc., the overplus in the hands of the Marshal was by the Court ordered to be paid to defendant Linforth, in part liquidation of his mortgage. (Paragraph VII, printed record.)

On the 8th day of March, 1872, the time for redemption—then being one year—having expired, the Marshal made to Jennings a deed, as required by law, and on the 9th day of the same month the said Jennings conveyed said property to Mary G. Hussey, one of the appellants herein, for $3,500. (Paragraph VIII, printed record.).

Paragraphs IX. X and XI of printed record refer to deeds which it is alleged were made without authority of law, and that the deeds referred to in Paragraph VIII were made to perfect the title in the said Mary G. Hussey, according to the original intentions of the parties.

This property, at the time of the execution of the mortgages above referred to, was a mere possessory right, the legal title at that time being in the government of the United States, and was patented by the United States to the mayor of Salt Lake City on the 1st day of June, 1872. (Paragraph XII, printed record.)

On the 11th day of December, 1871, Job Smith filed with the Probate Court for a deed to said property, and the said Mary G. Hussey on the same day also filed, and on the 24th day of May, 1873, by leave of said Probate Court, made a further filing, claiming to be entitled to a deed to said property. (Paragraph XIII, printed record.)

Upon the hearing of these several filings, said Court adjudged the said Smith to be the party entitled to a deed, and the said Mary G. Hussey not so entitled, for the reason that no valid foreclosure or sale had taken place or been made, but that the mortgages were a subsisting and valid lien upon said property. The District Court for the Third Judicial District, on appeal, affirmed this judgment, and upon appeal to the Supreme Court of the Territory,

the same was reaffirmed, and in pursuance of an order of said Supreme Court, the mayor, D. H. Wells, on the 19th day of November, 1873, made a deed to said Smith, thus casting the legal title to said real estate on the said respondents. (Paragraph XIV, printed record.)

Bernhisel and Linforth made assignment to Mary G. Hussey (Paragraph XV, printed record.)

Prayer of complaint is in the alternative, first, that the respondents be held as trustees, if the foreclosure and sale of the Bernhisel mortgage was valid, but if invalid then that be subrogated to the rights of Bernhisel and Linforth, and foreclose the mortgages. (Paragraph XVI, printed record.)

Prior to the commencing of this action we had a Supreme Court here, which by its decisions created a complete revolution in judicial matters, and left the bar at sea, as a ship without rudder or compass. They first held that the officers of the Territory, who had been acting as the executive officers of the District Courts from the organization of the Territorial government until 1870, were not the proper officers to execute process emanating from their Courts, even when exercising jurisdiction arising under the laws of the Territory; the Court then went so far as to hold that the District Courts were United States Courts and that the Territorial legislature had no right to pass the Civil Practice Act or change the common law rules of pleadings, and that the old chancery practice, and rules of the Supreme Court of the United States governed exclusively in all equity cases. Hence, the frame of the complaint in this particular action as also that of the demurrer. One of the judges while on the Supreme bench, went so far as to entitle his opinion, "In the Supreme Court of the United States in the Terri-"tory of Utah."

As before stated, a judicial revolution was set on foot and its strides were rapid and widespread, overturning precedents of long standing, creating inextricable confusion and demoralization.

Thus we find matters when this proceeding was commenced.

To this complaint a demurrer was filed on the 2d day of February, 1874. (Printed record, page 6.) When the

demurrer to the complaint was argued, the revolution before spoken of—contrary to all history—having in the meantime turned back, and judicial proceedings having assumed their normal condition, the Court and counsel for both parties to this action recognized and treated the complaint as a proceeding under the code and the demurrer as a general demurrer to the complaint, as prescribed in our Civil Practice Act.

The Court sustained the demurrer, announcing its decision in the following form, April 22, 1875: "Now, on "this day, the demurrer is sustained, and the bill dis- "missed without prejudice."

This "without prejudice" is in this case as idle as the wind, and as barren of comfort to the plaintiffs as a bed of thorns, as the statute of limitations had in the meantime, so far as the mortgages and notes were of benefit to us, intervened and barred us from any further proceedings or new action. Our only remedy was appeal.

The plaintiffs appealed to the Supreme Court of the Territory from this judgment, and the opinion of said Court, delivered by Boreman, justice, to be found on page 7, printed record, was given in the case.

We now turn our attention to this opinion, assuming the right to criticise the same, it being a part of or attached to the record. The Court affirms the judgment of the District Court on two points.

First—After stating the case, says: "It appears "upon the face of the bill that the decree upon which this "action is founded was rendered in a suit where the ap- "pellant"—meaning appellee—"Job Smith was sought "to be brought in by process served by the United States "Marshal, but, in which suit said Job Smith never "appeared. The United States Marshal did not have au- "thority at the time to make the service, and the Court "did not, therefore, have jurisdiction of the parties so as "to render a decree binding upon the respondents, it was, "as to them, void. There are not, therefore, sufficient "facts stated in the bill to warrant the Court in saying "that the respondents should hold the legal title in trust "for the appellants."

The Court here holds that the decree in the case of Bernhisel *vs.* Smith, and under which we claim, by pur-

chase, is void, and being void for want of jurisdiction over the person of Job Smith, that nothing passed to the purchaser at the sale of the premises, and, therefore, the respondents, who hold the legal title, cannot be held as trustees. If the Court had no jurisdiction over the person of Smith, we concede the proposition to be true that the decree was void and the purchaser at the sale took no title to the property, and that the respondents could not be held as trustees.

The Court gives no reason why the Marshal had no right to serve the process, but says he had "not the authority."

If the United States Marshal at the time was an officer *de facto*, then the service of process was good and the judgment was valid. It is not necessary for us to show that the U. S. Marshal was an officer *de jure*, but that he was an officer *de facto*, and that if he was, neither Job Smith nor any other person can take advantage of his not being an officer *de jure* in this proceeding.

We assign errors as follows, *viz:*

First—The Supreme Court of Utah Territory erred in holding "that the United States Marshal did not have "authority at the time of the service of the process, in the "case of Bernhisel against Job Smith and James Linforth, "to make said service, and for that reason the Court did "not have jurisdiction of the case and that its action was, "therefore, void."

Was the United States Marshal an officer *de facto?*

This depends upon what it takes to constitute such an officer.

We find many definitions of what it takes to constitute an officer *de facto*, but think the following covers the entire premises:

"An officer *de facto* is no other than he who has the "reputation of being such officer and yet is not a good "officer in point of law."

Now, testing the case by this rule, how was it possible for the Court to arrive at the conclusion announced? The record discloses this state of facts: John D. T. McAllister was discharging the duties of executive officer of the District Court in this Territory, proceedings in the nature of *quo warranto* were commenced to oust him; in that

proceeding the Supreme Court of this Territory held that McAllister was not the proper officer to serve process, and by its judgment he was ousted, the United States Marshal inducted into the office, the Court saying that *he* was the proper officer to serve all process issuing from said District Courts, both mene and final.

Thus, by an adjudication, first of the Third District Court, on the 12th day of May, 1870, the U. S. Marshal was adjudged to be the proper officer to serve the process in the Bernhisel-Smith-Linforth case, which judgment was afterward affirmed by the Court of last resort in this Territory.

That from the said 12th day of May, 1870, until the 30th day of April, 1872, twelve days less than two years, the U. S. Marshal was in the office by virtue of this judgment and serving all the processes issued out of the District Courts, both mene and final. The U. S. Marshal was in office under color of right, and can by no possibility of construction be deemed an usurper. During all this time the public recognized and called upon him as the executive officer, and he discharged all the duties imposed upon him by the office.

Now, if he was not an usurper, under this state of facts he was an officer *de facto*, and the Court did obtain jurisdiction of the person of Smith in the case of Bernhisel *vs.* Smith and Linforth, and the judgment was, therefore, valid

On the doctrine of *de facto* officer we call the Court's attention to the following authorities, being a very few of the many upon this subject:

State *vs.* Carroll, 38 Conn., 449;
Same case, 9 American R., 409;
Fowler *vs.* Bebee, 9 Mass, 231;
Commonwealth *vs.* Fowler, 10 Mass., 290;
Same case, 11 Mass., 338.

From the facts as appear in the bill, and the authorities, there can be no doubt but the U. S. Marshal was an officer *de facto*, and the respondents should be adjudged to hold the title in trust for appellants.

Second—The Supreme Court erred in "adjudging "and deciding that the bill did not sufficiently describe "the mortgage."

The complaint specifically described, in Paragraph III, printed record, the real estate, by metes and bounds.

In Paragraph V it says "that Smith, on the 13th day "of September, 1868, executed and delivered his promis- "sory note to John M. Bernhisel, and thereby promised to "pay said Bernhisel the sum of $1,350 on or before No- "vember, 1869, with interest, etc., and at the same time— "13th September, 1868—gave him a mortgage on said "real estate, conditioned to be void on the payment of the "money in said note specified."

A similar allegation is made in referring to the note and mortgage to Linforth.

We submit that this is a sufficient description of the instrument as a mortgage, and that the legal effect is sufficiently pleaded; especially as respondents sought to attack it only by a *general* demurrer.

Kent, in his 4th volume, page 136, says: "A mort- "gage is the conveyance of an estate by way of pledge "for the security of debt, to become void on payment of "it."

The allegation is, he—Smith—executed a mortgage on said real estate, to beome void on the payment, etc., showing the condition fully.

The term "mortgage" has a well defined, legal signification and meaning, and the Court should have given it that definition in connection with the further allegation, "to become void on payment, etc." It is easily seen that it was a conditional conveyance of the real estate, described in Paragraph 3 of the complaint.

Kays *vs.* Phelan, 19 Cal., 129.

But, suppose we are mistaken in this, there is another view of the case to be taken, *viz:*

The Court says "there do not, therefore, appear "sufficient facts to authorize a decree of foreclosure."

That is for the reason assigned by the Court that the allegation that "Job Smith gave a mortgage was a con- "clusion of law," * * * "neither the mortgage nor "its terms or conditions are set out, etc." The Court very pointedly intimated that if the mortgages had been pleaded, in *hæc verba*, or their legal effect, we would have been entitled to a subrogation and foreclosure. Being governed by this intimation or suggestion in the opinion,

we filed a petition for rehearing, assigning, among other reasons why a rehearing should be granted, that, conceding that the complaint was defective, as held by the Court, still the judgment of the District Court should be revised for the reason the judgment of that Court should have been: *First*, sustaining the demurrer, with leave to complainants to amend, and in default of such amendment, then final judgment on dismissal.

We cite on this point,

Gallagher *vs.* DeLaney, 10 Cal., 410.
Lord *vs.* Hopkins, 30 Cal. 78.

Upon the rehearing, the Court in its opinion uses this language. (Opinion, page 304 Utah Reports,):

"The various grounds urged for a rehearing of this "cause resolve themselves substantially into one point, "that this Court, having affirmed the judgment of the "Court below, dismissing the Bill, should have allowed "the appellants to amend. In the Court below, the bill "was demurred to upon the ground that it did not contain "facts sufficient to constitute a cause of action. The de-"murrer was sustained, and, no leave being asked to "amend, the Court dismissed the bill."

"No effort was ever made in the Court below to ob-"tain leave to amend. Nor has it ever been asked in this "Court, except as specified in the petition for a rehearing. "We think it is too late for this Court to interfere for the "relief of the appellants now." Wonderful logic! and that, too, emanating from the highest Court of a Territory of the importance of Utah, with its population of from 150,000 to 200,000 souls; its mineral resources unlimited, and annual products of the precious metals alone from $6,000,000 to $10,000,000. The contests arising over mines alone being of vastly more importance than all the litigation arising in many of the old States.

Had the Court, in its infinite wisdom, condescended to inform us how we could have moved in the Court below to amend a pleading that was no more in that Court than if it had never existed and was a myth, we might have been able to see the point and lamented the want of foresight in ourselves that is so brilliantly displayed in the extract of the opinion above quoted.

We never asked to amend because there was nothing

in the Court to amend, and we did not ask, as the Court intimated we did by our petition for a rehearing, to amend in the Supreme Court.

We asked that judgment should be reversed because the District Court had erred in sustaining the demurrer and dismissing the bill, and claim the judgment should have been, sustaining the demurrer, with leave to amend, and then judgment final, in default of such amendment. The reasoning of the Court in this is more refined and subtle than sensible.

We have thus far confined ourselves to the two points above mentioned, and assign as third error:

That the Supreme Court erred in holding that the judgment of the District Court was proper in "dismissing the bill."

Suppose we are mistaken in the position we have taken, and it should be held that under the circumstances the decree of foreclosure in the case of Bernhisel *vs.* Job Smith and Linforth was void for want of jurisdiction in the Court over the person of Smith, we then claim that the decree was void as to us as well as to respondents, and the Court will find this anomalous condition existing in this case. The Supreme Court of this Territory, as before shown, says, "that the District Court rendering the decree "in the case of Bernhisel *vs.* Smith and Linforth, had no "jurisdiction and the decree was therefore void." The same Court, when announcing its opinion on petition for rehearing, (page 305, Utah Reports), denies the rehearing, but at the same time goes outside of the points submitted in the petition and into the merits of the case, and uses the following language: "Were we to now allow "the amendment asked, to be made, still the complaint "would be insufficient, no authority being shown for the "plaintiffs to foreclose the mortgage the *second time.* A "purchaser at a judicial sale buys at his peril, the rule of "*caveat emptor* applying. There is no warranty, and if "the buyer takes nothing by his purchase and shows no "reason for setting the sale aside, and refunding the "money, he is at the end of the law, and must abide the "consequences. He cannot then, at that time, be placed "in the situation of the plaintiff in the foreclosure suit "prior to the foreclosure, and have that *suit gone through*

"*with again.* The object of that suit had been attained "by payment of the notes sued on by the proceeds of the "mortgage sale."

The first proposition—taking the two opinions in this case together—is, that the decree is void. *Second*, that, notwithstanding the decree was void, there being no jurisdiction in the Court, yet, if the amendment was allowed the complaint would be defective, because no reason would be shown why the mortgages should be foreclosed a *second time.* The Court here claims that what it had before pronounced an absolute nullity, was a legal foreclosure when applying to us. We claim that if the decree was void all things done under it were also void, and the sale would at most operate as an assignment of Bernhisel and Linforth's interests in the debt and mortgage, and for the first time in our practice have we met with so monstrous and inconsistent a doctrine emanating from any Court.

How the doctrine of *caveat emptor* can apply to a purchaser where the decree—under which he purchases—and all things done under it are void, we are unable to comprehend very clearly. As we understand the law, it only applies to title where there has been a valid judgment and decree.

The Court again says: "The purchaser cannot be "placed in the situation of the plaintiff, etc, and have that "suit gone through with again." The Court seems determined to misunderstand our position, or claim, or we have been very unfortunate in making ourselves understood, and feeling charitable towards the Court, we assume the latter to be the case, but must say we did not then, nor do we now, ask that the former suit for foreclosure be again gone through with, because the Court says that was *void.* How the "payment of the notes," which means, we have the right to suppose, the extinguishment of the debt, and consequently the mortgage lien could by these void proceedings be accomplished, is, we venture the assertion, beyond the comprehension of any one but a Utah judge. What we do claim and insist to be law and well understood by Courts of legal learning and expansive comprehension, is, conceding the decree in the case of Bernhisel *vs.* Smith and Linforth to be *void*, that the sale, etc., and all things done under this void decree were also

void. The decree being void, there was no foreclosure of the equity of redemption ; the decree being void the sale was also void as to Smith, but, at the same time, it operated as an assignment of the interest of Bernhisel in the debt and mortgage to the purchaser at such void sale, and the purchase became at once—by operation of law—subrogated to all the rights, legal and equitable, of Bernhisel before the void decree and sale.

The doctrine of subrogation is well settled, and, as we now recollect, it was taken from the civil and adopted into and became a part of the common law. It does not depend on priority, nor is it confined to cases of strict suretyship ; it is a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it.

McCormick *vs.* Irwin, 35 Pa. St., 111.

Privity of contract between parties is not necessary to the right of subrogation, which is founded on the mere principles of equity.

Kyner *vs.* Kyner, 6 Watts, 221.

We assign for a fourth error, the Court erred in holding that the right of subrogation did not exist in this case. And this presents another point for consideration, which is, the mortgage being given upon lands of the United States, and there being no warranty in the mortgages, would the after-acquired title—conceding we had a right to foreclose—inure to the benefit of the holder of the mortgages? It was claimed by the attorneys in the Courts below that it would not, and no doubt will again be urged upon the consideration of this Court. Upon this point we cite the following authorities :

Christy *vs.* Dana, 42 Cal., 174;
Clark *vs.* Baker, 14 Cal., 612.

The opinion of the Court in this last case was delivered by the then Chief Justice, Field, and on page 626 he states the case thus—that case presenting the same question that arises in this : "Whether Baker, upon the acquisition of the true, that is, the legal title, could impair by "its assertion, the lien of the mortgage upon the premises, "its determination must depend on the operation given to "the deed of mortgage, either by the common law, or the "provisions of the 33d section of the Statute concerning

"conveyances, of this State, upon subsequently-acquired "title, *or the obligations resting upon the mortgagor from "the nature of his contract with the mortgagee.*"

The Chief Justice, on page 630, says: "From the "authorities cited that, treating the mortgage as a con- "veyance, the subsequent title acquired by Baker did not, "by the common law, inure to the benefit of Clark, the "mortgagee." He then disposes of the case under Sec. 33 of the California Statute, and on page 632 uses this language: "It follows from our construction of this sec- "tion that by virtue of its provisions the title subsequently "acquired by Baker inured to the benefit of his mort- "gagee, as much so as if that title had been originally "possessed by him." After some further remarks, he goes on to say: "There is another consideration growing "out of the nature of the contract of mortgage, which "must lead practically to the same result. In the former "part of this opinion we treated the mortgage as an or- "dinary conveyance, and held that, regarded in that light, "it did not operate by the rules of the common law upon "the subsequently-acquired title, as it did not contain a "clause of warranty or other evidence, by recital or aver- "ment, of any intention to possess a greater estate than "that already possessed at the time. There is, however, "an obligation resting upon the mortgagor, from the "nature of his contract, which does not rest upon the "vendor. The mortgagor holds a very different relation "to the mortgagee from that of a vendor to a vendee. "By the execution of a conveyance without warranty, all "relations between vendor and vendee are dissolved. "They, henceforth, hold one another at arm's length, as "they do the rest of the world. The dealing between "them is completed; nothing further remains to be done. "*The reverse is the case between mortgagor and mortgagee.* "By the execution of the mortgage the transaction be- "tween them is only begun. Every substantial part re- "mains to be performed. The mortgagee is to return to "the mortgagor the estate and the mortgagor is to return "to the mortgagee the money and interest secured; and "until this is consummated, the obligation rests upon both "to do nothing which can impair the rights of the other, "or embarrass their enforcement. The mortgagor cannot

"waste or destroy the estate, property or thing—what-
"ever it may be—which he pledges as security. He can-
"not do anything which shall deprive the party whose
"money is taken from recourse upon the property accord-
"ing to the terms of the contract. He is allowed under
"the laws of this State"—in this instance Territory—"to
"retain the possession of the property against the form of
"his contract, but upon the trust necessarily implied that
"he will not do or permit any act to lessen the sufficiency
"of the original security."

The learned Chief Justice then quotes at some length from Story's equity jurisprudence on this branch of his opinion, and in support of the principles laid down.

He then cites Hilliard on Mortgages, as to the relation of mortgagor and mortgagee, as also from Patterson's opinion in Doe *vs.* Williams, 5 Adol & Ellis, 297, and proceeds as follows:

"It is sufficient, in the present case, to observe that
"the relation is one which requires him—mortgagor—
"to preserve the property for the purposes of the security
"for which it was originally pledged; and hence, to secure
"good faith and fair dealing, he is forever precluded from
"denying the existence of the lien which he has attempted
"to create, or defeating its enforcement against the prop-
"erty upon which it was placed. In the case at bar, the
"mortgage is upon the property, and not upon any par-
"ticular estate therein, or right thereto. It is the property
"itself which Baker"—Job Smith—"has pledged, and it
"is the property itself which he has promised, by his con-
"tract, to preserve for the purposes of the security; and
"equity will not suffer him, in violation of good faith, by
"any act, to impair or destroy the security Any claim or
"outstanding title he may have purchased only went to
"strengthen his own title to the premises, and hence,
"through him, to give possibly greater value to the
"security. It does not appear that Clark ever desired
"the claim or title to be bought in, etc."

Now, apply this reasoning to the case under discussion, and it does appear to us that there can be but one answer given. That it was the property that was pledged as security, and not any particular estate in the property. That Smith could do nothing to impair, lessen or destroy

the value of that security, and it does appear that Smith in this case did interpose and obtain the title over the protest and against the wish and will of said Mary G. Hussey.

We submit the argument of Chief Justice Field in this case without comment or suggestion, believing it to be to the point and unanswerable. To the same point we call attention to the authorities cited by the Chief Justice, *vis:*

Tartar *vs.* Hall, 3 Cal., 263;
Van Waggoner *vs.* McEwin, 1 Greenl., ch. 412;
1st Powel on Mortgages, 190;
Holdridge *vs.* Gillespie, 2 John, ch. 30;
Doe *vs.* Vickers, 4 Adol & Ellis, 782;
Bank *vs.* Walker, 2 Sand., ch. 344.

And in addition to the above authorities, we call the attention of the Court to the following authorities:

Kirkalda *vs.* Lawrence, 31 Cal., 455;
Haffley *vs.* Maier, 13 Cal., 14;
Whitney *vs.* Buckman, 13 Cal., 538;
Warburton *vs.* Mattox, Morris, Iowa, 369;
Pierson *vs.* David, 1 Clark, Iowa, 26;
Camp *vs.* Smith, 2 Minn., 173;
Hope *vs.* Stone, 10 Minn., 141;
Bush *vs.* Marshall, 6 How., U. S., 288;
Treddgill *vs.* Pintard, 12 How., U. S., 37;
Fackler *vs.* Ford, 24 How., U. S., 323;
Phelps *vs.* Kellogg, 15 Ills., 135.

In this connection we call the Court's attention to the case in 12 Howard, U. S., showing to what extent Courts will go in the enforcement of liens. In this case a pre-emptor sold his right to A. A afterward sold the same property to B, the latter agreeing to pay, as part of the purchase money, a certain sum then due from A to the pre-emptor. B afterward files for a pre-emption on the land and obtains a patent in his own name, and then refuses to make further payments. The pre-emptor having died, his administrator filed a bill to ascertain the amount due and enforce an equitable lien against the land. The Court holds that by virtue of the contract between A and B, the complainant had a lien on the land. We think

the case at bar much stronger than the one just cited, as the contract in the case at bar, *to wit:* the mortgage creates an express lien, and the attempted foreclosure being void, that lien still exists.

This brings us to the main point in the fourth assignment of error, which is that the Court erred in holding that the right of subrogation did not exist in this case.

And in presenting this point we of course admit, for the sake of the argument, that the decree in the case of Bernhisel *vs.* Smith and Linforth was *void.*

As before stated, the right of subrogation does not depend upon privity of contract, nor is it confined to strict cases of suretyship, but it is a mode which equity adopts to compel the ultimate discharge of the debt by him who in in good conscience and equity ought to pay it.

A short review of the facts in this case shows that Job Smith was the owner of the possession, improvements, etc., and in the possession of the real estate described in the complaint. That on the 13th day of September, 1868, he gave a note to John M. Bernhisel for $1,350, with interest as specified therein; that on the same day and at the same time he executed to Bernhisel a mortgage on said real estate to secure the payment of the money in the note specified, as also the interest which might accrue. That afterwards, on the 16th day of September, 1869, Smith being indebted to James Linforth on promissory note in the sum of $1,058.43, he executed to the said Linforth a second mortgage to secure the payment of the same, upon the same real estate. These notes both being due, and the principal and interest remaining unpaid, Bernhisel commenced foreclosure proceedings, the United States Marshal served the process and Smith made default; a decree was entered and sale made by the said Marshal, to William Jennings for the sum of $3,000, which was applied to the payment of costs, of foreclosure and sale, the Bernhisel judgment, and, by order of the Court, the surplus to the payment of the Linforth claim. Jennings sells to Mary G. Hussey and she pays $3,500; a deed was made to her by Jennings of all his interest to said property. Under this state of facts—the Bernhisel decree being void—we claim that the sale to Jennings operated as an assignment of the debt and mortgage to him, as purchaser at the

said sale, and that he was subrogated to the rights of Bernhisel before the pretended foreclosure, and that his subsequent conveyance to Mary G. Hussey operated as an assignment of the debts and mortgages to her, and that the said mortgages are subsisting and valid liens upon said real estate.

Under our Statute Civil Practice Act, Section 1229, Compiled Laws of Utah, requiring the real party in interest to bring suit or be made defendant, it was entirely unnecessary to join Jennings as a party with the appellants, they being the real parties in interest, and Jennings having parted with *his* interest would be an unnecessary party. Under the old practice it would probably have been necessary, as suggested in the case of Gilbert *vs.* Cooley, Walker's Mich., ch. 494, to have made Jennings a party.

A purchaser at a void sale of mortgaged premises is subrogated to all the rights and equities of the mortgagee, before the void foreclosure.

Bitter *vs.* Henshaw, 7 Iowa, 97;
Morris *vs.* Craig, 3 Blackford, 293,
Preston *vs.* Harrisson, 9 Ind., 1;
Dunn *vs.* Frazier, 8 Blackford, 432;
McGee *vs.* Ellis, 4 Littell, Ky., 244;
Bird *vs.* Crosthwaite, 6 Iowa, 219;
McLaughlin *vs.* Daniel, 8 Dana, Ky., 181;
Eddy *vs.* Trover, 6 Paige, ch 521;
Gilbert *vs.* Cooley, Walker, ch. 494;
Jackson *vs.* Bowen, 7 Cowen, 13;
24 Mississippi, 665.

In the case of Gilbert *vs.* Cooley, on motion to dismiss the bill, the Chancellor says: "It is not necessary on "this motion to inquire into the validity of the statutory "foreclosure. Conceding it to be irregular and no bar to "the equity of redemption, the sale and sheriff's deed "transferred Fitch and Gilbert's interest in the mortgage "to Chas. T. Gilbert, the purchaser. Citing Jackson *vs.* "Bowen, 7 Cowen, 13. Whatever interest they had in "the mortgage at the time of sale he now has, and he "either alone or in connection with his subsequent "grantees, should have filed the bill; and not the com-"plainant, who has no interest in the mortgage or mort-

"gaged premises." As before stated, our statute does away with the necessity of joining Jennings with his grantee, and should we have done so, the complaint would have been demurrable on the ground of a misjoinder of parties, as it would appear upon the face of the complaint that Jennings has no interest in the matter.

The case of Jackson *vs.* Bowen & Neff. 7 Cowen, 13, is very similar to the case of Gilbert *vs.* Cooley, at least the question came up on the validity of a statutory foreclosure. And the Court held that "a conveyance by a mortgagee as upon a statute foreclosure, under power of sale in his mortgage, even if the proceedings to foreclose be irregular, yet carries all his interest as mortgagee, to the purchaser, as well in the *debt* as in the land mortgaged, such deed at least operates as a good assignment of the mortgage; and the purchaser may claim as assignee."

We cite on this principle of subrogation the case of Brobst *vs.* Brock, 10 Wall, 519.

On page 533 the Court say—Mr. Justice Strong delivering the opinion—"But it is contended the judgment "was void in law, because no service of the *seire facias* "was made upon the mortgagor, etc., * * and because "there was no return of *nihil* in default of such service. "We shall not discuss that, assuming that the objection is "well taken, and so it was assumed by the Court below. " * * Now, the worst that can be said of the sheriff's "sale under the judgment so obtained, is, that it did not "pass the title to the equity of redemption; that it did "not operate as a *foreclosure of the mortgage.* But did it "not, in connection with Freleyss' deed to Smull, made at "Boyer's instance, and the subsequent conveyances by "which Brock"—in this case Hussey—"became invested "with the title, operate to transmit to Brock the rights of "the mortgagee? We think it did. * * * * * * "It is enough that an irregular or *void* judicial sale, made "at the instance of a mortgagee, passes to the purchaser "all the rights the mortgagee as such had. For this au-"thority is hardly needed."

But the Justice refers to the cases of Gilbert *vs,* Cooley and Jackson *vs.* Bowen & Neff—quoted above—with approbation.

We, therefore, claim: *First*, That the foreclosure of the mortgages in the case of Bernhisel *vs.* Smith and Linforth was regular and valid and that the equity of redemption was foreclosed and the sale passed the same to Jennings, the purchaser at the sale, and Smith having obtained the outstanding title and sold one-half to the other two respondents—they knowing all the circumstances—the respondents should be adjudged to hold said legal title in trust for appellants. Conceding the pleadings to be technically defective, still enough is shown to raise an equity, and the case should be reversed and permit the complaint to be amended.

In case this Court should hold as has been held by the Supreme Court of this Territory, that the case of Bernhisel *vs.* Job Smith and Linforth was void, then we claim that we have the right, by all the rules of equity, in the light of the fact of this case and the reason of the authorities cited and that have from time to time appeared on the subject, to be subrogated to all the rights of Bernhisel and Linforth before the void proceedings were had, and as assignee of the debts and mortgages of said Bernhisel and Linforth be permitted to foreclose said mortgages. Any other rule would be an appropriation of the money of Mary G. Hussey to the payment of Job Smith's debts, without any redress on the part of said Hussey. May it please the Court, can this be law?

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Attorneys for Appellants.

SUPREME COURT,

Of the UNITED STATES.

No. 131.

MARY G. HUSSEY, Appellant,

vs.

JOB SMITH.

Appeal from the Supreme Court of Utah Territory.

Brief for Respondent.

HERALD Print.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1878.

MARY G. HUSSEY, Appellant,

vs. No. 131.

JOB SMITH.

BRIEF FOR RESPONDENT.

This appeal, coming from a Territory, will be reviewed solely on questions of law, the Court will not look into evidence, but will accept the results of the evidence as found and certified by the Court below. The Act of Congress of April 7, 1874, concerning the practice in the Territorial Courts and appeals therefrom, provides that the appellate jurisdiction of this Court over the judgments and decrees of the Territorial Courts, "in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according," etc., "*provided*, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission or rejection of evidence, when excepted to, shall be made and certified by the Court below and transmitted," etc.

The District Court made and certified a statement of the facts of the case (Transcript, p. 25); on appeal, the Supreme Court of the Territory (p. 29) say "there does not appear to have been any exception to any ruling of the Court below, nor to the finding of facts, nor to the conclusions of law. No effort seems to have been made for a review of the case in the Court below. There was no motion to correct the findings, nor any motion for a new trial. We, therefore, must accept the findings of the Court below as the true and correct statement of the case." The same is equally conclusive in this Court; and

the postulated matters informally inserted in the transcript as evidence are out of the case and will not be regarded.

The facts thus found and certified fully sustain the decree or judgment.

Job Smith was an inhabitant of Salt Lake City and the occupant of the premises in question, at the time of the entry of the townsite by the mayor and for many years before, and ever since, and still is such; the appellant never was either, but was a non-resident of the Territory and a resident of the State of Ohio.

He is within the line of beneficiaries for whom the Townsite Acts were passed; she is not. *Cofield vs. McClellan*, 13 *Wallace*, 331.

But should we look into the extraneous matters brought into the transcript, but not part of the record, the result would not be different. She claims a paper title predicated upon a nullity and affected by the maxim *caveat emptor*. In the alleged foreclosure suit the Court had no jurisdiction of the person of Smith; he swears that the only process ever served on him in the case was a summons, and that it was served by the United States Marshal for the Territory; the Court finds that the summons was served by the Marshal; and it is not claimed by the appellant that there was any other service of this process; but the appellant insists that the United States Marshal was the Territorial Marshal *de facto* and could properly serve the process in such a case. This Court has decided this point in the case of Clinton *vs.* Englebrecht, 13 Wall, 434, where it was held that the United States Marshal's duties in the Courts had exclusive relation to cases arising under the laws and constitution of the United States.

The doctrine which treats as valid the acts of an officer *de facto* done within the sphere of the duties of a particular office which he was discharging for the time being, under color of office, has never been extended so as to recognize as valid acts beyond the sphere of his office but pertaining to the duties of an entirely different office. The United States Marshal was not *ex officio* either Territorial Marshal or Sheriff. To the two latter officers exclusively pertained the duty and power to serve

the process, and the United States Marshal did not claim or pretend to hold or act as either of these.

The supposed mortgage is not of a fee simple, or with warranty, or with covenant of further assurance of title or to stand seized, but merely such "right of possession, claim and interest" which Smith then held; and an after-acquired title would not have inured to the benefit of a purchaser, even if the Court had had jurisdiction of the person of Smith and the proceedings had been, in all respects, regular. The doctrine of estoppel does not apply in such a case. The result of the current of authorities on this point is, that a grantor without warranty should be considered as intending to grant only what he has; while a grantor with warranty intends to grant what he has or may subsequently acquire otherwise than by the grantee's acts, 3 Parsons on Contr., 791, 2 Smith's Leading Cases, 625–642, Rawle on Cov. c. ix., Comstock *vs.* Smith, 13 Pick., 116; McCracken *vs.* Wright, 14 Johns, 193; Brown *vs.* Jackson, 3 Wheaton, 449; Jackson *vs.* Hubble, 1 Cowan, 613; Edwards *vs.* Varrick, 5 Denis, 664; Doane *vs.* Wilcut, 5 Gray, 338; Chauvin *vs.* Wagner, 18 Mo., 531; Gibson *vs.* Choteau, 39 Mo., 536; Bigelow on Estoppel, 334–7, 347 and note; 2 Sugdon on Vendors, 689 * and note; Hilliard on Mort., 7. The cases of Van Rensalaer *vs.* Kerney; 11 How., 297; French *vs.* Spencer, 21 How., 228; and Somes *vs.* Skinner, 3 Pick., 52 (the latter in special reference to a mortgage), fully recognize the rule, and the decisions applying the doctrine of estoppel are based on the terms of the instruments amounting to a warranty working an estoppel.

At the time of these transactions there was no statute of uses in Utah; the act concerning conveyances, passed in 1874, provides (§ 11) that if any person shall hereafter convey any real estate by conveyance *purporting to convey the same in fee simple absolute*, and shall not at the time have the legal estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, etc.; and (§36) places deeds and mortgages on the same footing.

SAM'L A. MERRITT,
Attorney for Respondent Job Smith.

SUPREME COURT,

Of the UNITED STATES.

No. 132.

JOSEPH G. HUSSEY, *et al.*, Appellants,

vs.

JOB SMITH, *et al.*, Appellees.

Appeal from the Supreme Court of Utah Territory.

SAM'L A. MERRITT,
Counsel for Appellees.

Herald Print.

SUPREME COURT OF THE UNITED STATES,

JOSEPH G. HUSSEY and MARY G. HUSSEY,
Appellants,

vs. No. 132.

JOB SMITH, SAMUEL A. MERRITT and JOSEPH B. ROSBOROUGH,
Appellees.

BRIEF FOR APPELLEES.

1.—The United States Marshal had no authority to serve a process in Bernhisel *vs.* Smith. (Section 10 Organic Act for Utah, Clinton *vs.* Englebrecht, 13 Wall, 434, Hornbuckle *vs.* Toombs, 18 Id., 648). The Court having no jurisdiction of the person of the defendant, the judgment was void, the sale thereunder by the Marshal was void for both the foregoing reasons, and the subsequent order of the Court could not give validity to his acts. No authority could hold, and no force of logic can show that the tenure of the office of United States Marshal for the Territory, and the exercise of its duties, did or could constitute such officer, *de facto*, Territorial Marshal or Sheriff; he did not claim to hold either of the latter offices. The only service of process on Smith or the property was by him as United States Marshal, and that was void.

2.—Neither Bernhisel, plaintiff in that case, nor the plaintiff in this case, was purchaser at that sale; but the

property was bought by Jennings. There is no warranty in judicial sales, where the maxim *caveat emptor* applies in all its rigor. (Rorer on Jud. Sales, §459; Monte Allegre, 9 Wheaton, 616; Fox *vs.* Mensch, 3 Watts and Sergt., 444; 33 Penn., 276.)

3.—The title to the lot in controversy has been adjudicated in favor of Smith, as appears by the bill, and appellant is estopped from controverting that. (La Gueo *vs.* Goerneur, 1 Johns Cases, 436; Treadway *vs.* Semple, 28 Cal, 652.)

4.—The defendants are not estopped from setting up and relying upon the after-acquired title. Estoppel, in this particular, arises only where the grantor or mortgagor has given, in the instrument, or in some paper executed with, or referred to, in it, covenant of warranty or further assurance of title, or has expressly undertaken to convey a particular estate, or by statute of uses giving that effect to deeds which purport to convey in fee simple but without warranty.

The mortgage in this case is not set forth, and it is not shown whether it was with or without covenants; in such case the Court will presume that it was without covenants, and hold that the plaintiffs do not disclose matter sufficient to raise an estoppel. (Jackson *vs.* Winslow, 9 Cowan, 18.)

There was no statute of uses in Utah till long after the transactions detailed in the bill.

The rule is well settled that a party who, without title to land, conveys by deed with covenant of warranty, or further assurance of title, and afterwards acquires title to such land, is estopped from setting up such after-acquired title against his prior grantee. (Comstock *vs.* Smith, 13 Pick., 116; McCracken *vs.* Wright, 14 Johns, 193; Brown *vs.* Jackson, 3 Wheaton, 449; Jackson *vs.* Murray, 12 Johns, 201; Same *vs* Stevens, 16 Id., 110; Same *vs.* Hubble, 1 Cowan, 613; Edwards *vs.* Varrick, 5 Denio, 664; Doane *vs.* Wilcut, 5 Gray, 338; Chauvin *vs.* Wagner, 18 Mo., 531; Gibson *vs.* Choteau, 39 Mo. 536; 2 Parsons on Contr., 789–91; Smith's Leading Cases, 610, 688; Rawle on Cov., 409; 2 Sugden on Vend., 135, 689 * and note.)

In the very thorough consideration given to this subject in Van Rensalaer *vs.* Kearney, 11 Howard, 297, this Court fully recognize and admit the rule, though it was held that the agreement to convey a particular estate was found in the instruments and documents referred to, and therefore the grantor was estopped.

The rule applies to mortgages as well as to deeds. (Somes *vs.* Skinner, 3 Pick., 52; 2 Parsons on Contr., 791.)

5—Where a party seeks to enforce a right or equity founded on a written instrument, he should, in his complaint, set forth the instrument according to its legal effect, or in *haec verba*.

6—It was too late to seek to amend the bill after judgment on appeal in the Supreme Court of the Territory; and the refusal of the Court to grant a rehearing, reverse the judgment and remit the case to the Court below, for that purpose, was proper and in accordance with the usual course of procedure where a party stands upon his pleading; an occasional instance of inconvenience or hardship furnish no good reason for departing from settled rules of practice.

SAM'L A. MERRITT,
Counsel for Appellees.